



Federal Bar Association

April 12, 2002

The Honorable Clay Shaw, Jr.
Chairman
Subcommittee on Social Security
U.S. House of Representatives
B-316 Rayburn House Office Building
Washington, D.C. 20015

**Re: H.R. 4070, the "Social Security
Program Protection Act of 2002"**

Dear Chairman Shaw:

I am writing to you in support of Title III (Attorney Fee Payment System Improvements) of H.R. 4070, the "Social Security Program Protection Act of 2002", which you introduced on March 20, 2002. Thank you for your sponsorship of this important legislation.

As you know, the Federal Bar Association is the only national association of private and government lawyers engaged in practice before the federal courts and federal agencies. Over fifteen thousand members of the legal profession belong to the Federal Bar Association. There are also within the FBA over a dozen sections organized by substantive areas of practice, including the Social Security Section, which I chair. (In that regard, these comments are exclusively those of the Social Security Section of the FBA and do not represent the official views of the Social Security Administration (SSA), in whose employment I serve as an Administrative Law Judge.)

The Federal Bar Association's Social Security Section, unlike other organizations associated with Social Security disability practice and representing the narrow interests of one specific group, encompasses all attorneys involved in Social Security disability adjudication, including attorney representatives of claimants, administrative law judges (ALJs), staff attorneys in the SSA Office of Hearings and Appeals (OHA) and Office of General Counsel, U.S. Attorneys and U.S. Magistrate Judges, District Court Judges and Circuit Court Judges.

The primary interest of the FBA's Social Security Section is in the effectiveness of the adjudicatory processes associated with hearings in the Office of Hearings and Appeals, the appeal process at the Appeals Council, and judicial review in the federal

courts. We believe that representation of claimants by attorneys is a positive contribution to those processes and should be encouraged. Since the Social Security Administration's handling of the payment of fees to attorneys has an impact on their willingness to accept disability cases, the matter is of considerable importance to them and the conduct of their legal practice.

With this in mind, we believe that Title III (Attorney Fee Payment System Improvements) of H.R. 4070, the "Social Security Program Protections Act of 2002," deserves our endorsement for its intent to accomplish two important objectives:

- The extension of the withholding of fees to Supplemental Security Income (SSI) cases; and
- A limitation of the amount of the fee charged by SSA to process the fee withholding.

Extension of Fee Withholding to Supplemental Security Income (SSI) Cases

Attorneys who practice Social Security disability law overwhelmingly endorse the extension of withholding fees in SSI cases for direct payment. There is no question that attorneys are reluctant to take SSI cases, due to the high risk of nonpayment for services rendered. This is reflected in SSA's 2000 statistics at the OHA level, which show that 74.9% of Title II claimants were represented while only 45.9% of Title XVI claimants were represented. Many attorneys simply decline to handle SSI cases, and this appears to be a growing trend. Those who do accept such cases tend to do so out of a sense of obligation and often in the spirit of *pro bono* work. Moreover, of those attorneys who now take SSI cases, it is likely that some will discontinue doing so, given the 6.3% reduction in the amount of fees they collect in Title II cases where there is direct payment by SSA. SSI claimants should not have to rely upon the collective good conscience of a few attorneys for representation.

According to SSA statistics, more than one-half of all SSI claimants are unrepresented. While Administrative Law Judges are charged with protecting the interests of *pro se* claimants and do their best to meet that obligation, it is done in the context of a very heavy caseload. ALJs carry hundreds of cases on their dockets. The reality is that a represented claimant, by virtue of the time, attention and expertise that a representative can provide, has a better chance of success in prevailing in their appeal. This is recognized by the Consortium for Citizens with Disabilities, as reflected in Marty Ford's testimony at the May 2001 hearing of the Subcommittee. While resources such as legal services and *pro bono* attorney work are invaluable, they are limited in their availability. As the CCD pointed out, the potential denial of benefits for SSI claimants, due to lack of experienced legal representation, far outweighs the burden of having reasonable attorney fees withheld from their back benefits.

SSA and others oppose the extension of the withholding of attorney fees to SSI cases primarily because of the low-income status of SSI recipients. They point to the

obligation and need of SSI recipients to repay various debts incurred during the application process, such as loans for basic needs. They claim that the withholding of fees from past due benefits might wipe out the ability of recipients to repay those just debts.

The FBA likewise recognizes and appreciates the financial dilemma of SSI recipients. Nonetheless, the FBA views an incurred attorney fee debt as a debt equally worthy of repayment out of an SSI recipient's back benefits. The attorney who assisted the claimant in obtaining the benefits has a legitimate claim on the claimant's available assets. The bottom line is that SSI claimants are better off if awarded benefits, and the likelihood of that happening rises when they are ably assisted by counsel. The FBA perceives no persuasive reason to treat SSI cases differently from Title II cases vis-a-vis the withholding of reasonable attorney fees from past due benefits.

The 6.3% Assessment Charged by SSA to Process the Attorney Fee

The Federal Bar Association historically has opposed the imposition of any SSA assessment for withholding and direct payment of attorney fees from past due benefits. The FBA on April 15, 1998, through action by its National Council, adopted a resolution in opposition to the assessment of fees in Social Security and SSI cases, recognizing that such fees are "likely to severely and adversely impact the ability of claimants to obtain legal representation." We communicated those views to the Subcommittee and others in Congress prior to passage of the "Ticket to Work" legislation (Pub. Law 106-170), which established the 6.3% assessment.

Indeed, we concur with the May 2001 hearing testimony of Nancy Shor, made on behalf of the National Organization of Social Security Claimants' Representatives, that it is troubling that there does not appear to be any logical connection between the amount of the fee and the actual cost to SSA to withhold and issue a check for attorney fees.

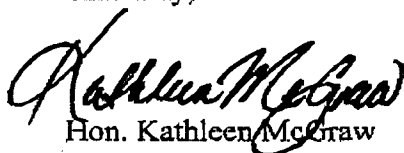
It has come to the attention of the FBA that attorneys are increasingly trying to avoid the current 6.3% "tax" on their services by waiving direct payment and filing a fee petition in lieu of a fee agreement. It requires no study to know that approval of a fee agreement by an ALJ takes a matter of moments and virtually no staff time within OHA. In contrast, when a fee petition is filed, ALJ and staff time rise dramatically -- at no small cost to SSA. Yet, SSA receives no fee for processing a fee petition if there is no direct payment of fees. Thus, if this trend continues, the imposition of the 6.3% user fee may actually create greater costs for SSA given the increased cost of ALJ and OHA staff time in handling fee petitions. Attorney attempts to avoid what is viewed as a confiscatory tax on direct payment of their fees may give new life to the cumbersome fee petition process that the fee agreement and direct payment were designed to avoid.

In sum, the FBA urges elimination of the user fee altogether. We recognize, however, that any reduction in the amount of the fee is an improvement in the current

legislation, and we therefore urge passage of the \$100 limitation on the user fee as set forth in Section 301 of H.R. 4070.

In closing, I want to thank you once again for your introduction of this important legislation and your valued chairmanship of the Subcommittee. The Social Security Section of the Federal Bar Association looks forward to working with you on this and future issues relating to Social Security disability case adjudication. Please contact Bruce Moyer, our government relations counsel (301-270-8115) if you have any questions. Thank you for your consideration.

Sincerely,



Hon. Kathleen McGraw
Chair
Social Security Section

cc: Hon. Sam Johnson
Hon. Michael "Mac" Collins
Hon. J.D. Hayworth
Hon. Kenny C. Hulshof
Hon. Ron Lewis
Hon. Kevin Brady
Hon. Paul Ryan
Hon. Robert T. Matsui
Hon. Lloyd Doggett
Hon. Benjamin L. Cardin
Hon. Earl Pomeroy
Hon. Xavier Becerra



Federal Bar Association

Fax Coversheet

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House Social Security Subcommittee

FROM: Judge Kathleen McGraw

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PAGES: 5

RE: H.R. 4070

DATE: 04/12/02

BILL TO: SSLS

Please see attached.